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**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term, 1984

KERR-McGEE CORPORATION,

Petitioner,

versus

THE NAVAJO TRIBE OF INDIANS, et al.,

Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**BRIEF OF AMICUS CURIAE
SALT RIVER PROJECT AGRICULTURAL
IMPROVEMENT AND POWER DISTRICT
IN SUPPORT OF THE PETITIONER**

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INTERESTS OF THE AMICUS CURIAE AND INTRODUCTION

The amicus curiae Salt River Project Agricultural Improvement and Power District, a political subdivision of the State of Arizona, is the managing agent of the Navajo Project, a coal-fired electric generating plant located on the Navajo Indian reservation in Arizona. The Navajo Project is co-owned by the amicus, the City of Los Angeles, Arizona Public Service Company, Nevada Power Company and Tucson Electric Power Company.

The amicus is also the managing agent of the Coronado coal-fired electric generating plant located off the Navajo reservation. It is co-owned by the amicus and the City of Los Angeles.

The plants are fueled in substantial part by on-reservation coal resources mined by the Peabody Coal Company, and the Pittsburgh and Midway Coal Company, respectively. To the extent that the Navajo Tribe can tax these fuel suppliers,¹ certain taxes would be passed along to the plants' owners under their coal supply contracts. The owners and their customers in Arizona, California, and Nevada can be directly affected by the outcome in this case.

The amicus urges this Court to grant Kerr-McGee Corporation's Petition for Writ of Certiorari because the opinion of the court below ignored the important role Secretarial approval plays as the only remaining check against unlawful tribal conduct and otherwise unrestrained tribal exercise of civil regulatory jurisdiction over nonmembers.

ARGUMENT

In *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 731 F.2d 597, 603-604 (9th Cir. 1984), the court below decided an important question of federal law in a way in conflict with the applicable decision of this Court. This is a classically cert-worthy case under Rule 17(1)(c), of the Rules of this Court. Without reference to the controlling decision of this Court, the court below held that the Navajo Tribe could tax non-Indians even without the approval of the Secretary of the Interior.² 731 F.2d at 604.

¹ By contract, the Navajo Tribe has promised not to tax the owners and Peabody Coal Company in connection with the Navajo Project. No such promise has been made to Pittsburgh and Midway Coal Company in connection with the Coronado plant.

² And even though the Treaty with the Navajo of 1868 put them under the management of the "proper agent." Art. 12(5). II C. Kappler, *Indian Affairs, Laws and Treaties*, 1015, 1019 (1904).

The important question of tribal taxing power over non-Indians was decided by this Court in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). Over objections that non-Indians had no right to participate in tribal government, could have federal claims adjudicated in tribal forums without possibility of federal judicial review at any point, and that tribal taxing power was not limited by constitutional or statutory constraint, this Court nonetheless upheld the power of Indian tribes to tax non-Indians. The dissenting opinion of Justice Stevens, along with the Chief Justice and Justice Rehnquist, stated with great force the genuine dangers to civil liberties created by an acknowledgment of a tribal power to tax non-Indians. This Court's answer to the dissent's recognition of these dangers was as follows:

Of course, the Tribe's authority to tax nonmembers is subject to constraints not imposed on other governmental entities: the Federal Government can take away this power, and *the Tribe must obtain the approval of the Secretary before any tax on nonmembers can take effect*. These additional constraints minimize potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner, and ensure that any exercise of the tribal power to tax will be consistent with national policies.

455 U.S. at 141 (emphasis added).

The dissent characterized the Secretary of the Interior's power to veto a tribal tax as a poor substitute for the "protection afforded by rules of law." 455 U.S. at 190. Certiorari must be granted in this case because the Ninth Circuit has abandoned even the minimal safeguard provided by Secretarial review, and did so without reference to this Court's opinion in *Merrion*.

That the fear of unfair or unprincipled application of the tribal power to tax is no mere abstraction is illustrated by the experience of the owners of the Navajo Project with both the Navajo and Hopi Indian Tribes. The Navajo Tribe expressly promised them that it would not tax the Navajo

Project or its coal supplier. This promise is contained in the lease under which the owners operate the Navajo Project electric generating plant. And yet soon after the plant's completion, the Tribe enacted the taxes which are the subject of the Petition before this Court and sought to apply them to the owners. The owners resisted these taxes in the United States District Court for the District of Arizona and in the United States Court of Appeals for the Ninth Circuit where, after full briefing and oral argument, the Tribe mooted the appeal by reaffirming its covenant not to tax.

The Hopi Indian Tribe enacted a coal severance tax on coal mined on lands off its reservation, and thus beyond its clear jurisdiction. The plants' owners and others appealed to the Secretary from the enactment of this tax through the administrative mechanism provided by the Hopi's Indian Reorganization Act constitution and federal regulations. The Secretary of the Interior vetoed the Hopi tax as being in violation of federal law, thus proving the wisdom of this Court's requirement that before a tribe can tax it must obtain the approval of the Secretary.

After this Court's decision in *Merrion*, the only thing which stands between the assertion of unlawful tribal power and non-Indians is Secretarial review. Non-Indians do not and cannot participate in tribal governmental power. And, after *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), non-Indians have no opportunity to present their Indian Civil Rights Act claims to a federal forum. State forums have no jurisdiction. A tribal forum is no forum at all because Indian tribes do not recognize the doctrine of separation of powers, and in any event, there is no federal judicial review, even by this Court, of the judgments of tribal forums, even over federal questions.

All that stands between this sorry state of affairs and non-Indians is the minimal protection this Court provided when it stated that tribes *must* obtain the approval of the Secretary before any tax on nonmembers can take effect. And yet the Ninth Circuit has eliminated even this, at best, marginal substitute for the protection afforded by rules of law.

This Court should grant the Petition for Writ of Certiorari to review this important question decided by the

Ninth Circuit in conflict with this court's decision in *Merrion*.

CONCLUSION

Many non-Indians live on non-Indian owned land within the exterior boundaries of Indian reservations. Others, including the amicus and its co-owners, do business on reservations. Non-Indians have no voice in tribal government, and therefore the important check of democratic control of governmental power is absent. Tribal power is not subject to constitutional or statutory limitation in any meaningful way. Federal rights can be lost or adjudicated in tribal forums with no possibility of federal or state judicial review. All that stands between the assertion of unlawful tribal power and non-Indians is the minimal protection afforded by this Court in *Merrion*: that before a tribe can tax nonmembers, it must obtain the approval of the Secretary of the Interior. Because the Ninth Circuit ignored this Court's opinion, the Petition for Writ of Certiorari of Kerr-McGee Corporation should be granted.

Respectfully submitted,

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